Mich. 15; and whether the consideration is adequate or not, is a question which the court will not examine. If the contract shows on its face a legal consideration, it is sufficient; but whether adequate or inadequate to the restraint imposed, must be determined by the parties themselves, upon their own view of the circumstances attending the particular transaction; whereas, if it were otherwise, it would be the court and not the parties making the contract: *Guerand* v. *Dandelet*, 32 Md. 561. It has been stated that the reasonableness of the consideration is a question of law, evidence not being admissible outside of the contract, therefore the cause of the consideration must be disclosed. 2 Addison on Cont. 741, bottom paging and note (g).

EUGENE MCQUILLAN.

St. Louis, Mo.

RECENT ENGLISH DECISIONS.

Court of Appeal.

JOSEPH v. LYONS.

A registered bill of sale of personal property which includes stock in trade to be afterwards acquired is, as to such stock in trade, only a contract to assign and the vendee takes only an equitable title. Such vendee cannot maintain trover for the property against a *bona fide* pledgee, who received such goods from the vendor in the ordinary course of business.

In the absence of anything to lead the pledgee to believe a bill of sale existed, he is not chargeable with constructive notice by reason of his failure to inquire if there was such a registered bill of sale.

APPEAL of the defendant from the judgment of HUDDLESTON, B., at trial, in an action to recover 171*l.* for the detinue and conversion of certain jewelry which the plaintiff claimed under a bill of sale.

By a duly registered bill of sale, dated February 3d 1881, F. Manning, by way of security for certain money due from him to the plaintiff, assigned to the plaintiff the goodwill and interest of him, the said F. Manning, in the business of a gold and silversmith, carried on by him at a certain shop in Worcester, and also all the stock-in-trade in or about or belonging to the premises, and also all the stock-in-trade which should or might at any time during the continuance of the security be brought into the premises or be appropriated to the use thereof, either in addition to, or in substitution

for, the stock-in-trade then being thereon or belonging thereto. It was provided that Manning should not, whilst in possession, remove the chattels from the premises without the consent of the plaintiff. The deed also contained a declaration that all future property thereinbefore assigned should be subject to the security thereby made, and the powers, covenants, and provisions thereinbefore contained, although the same or any part thereof might not be capable of passing at law by the assignment thereinbefore contained.

Manning pledged with the defendant, a pawnbroker at Birmingham, certain jewelry which had been brought on to the business premises as stock-in-trade after the date of the bill of sale. The defendant received the pledge in the ordinary course of business and without actual notice of the bill of sale.

At the trial of an action by the plaintiff to recover the jewelry or its value from the defendant, HUDDLESTON, B., gave judgment for the plaintiff for 171*l.*, to be reduced to one shilling on the goods being returned to the plaintiff. The defendant appealed.

Jelf, Q. C., and *Clay*, for the appellant.

A. T. Lawrence, and *Darling*, for the respondent.

BRETT, M. R., after stating the facts, said—It was argued for the plaintiff that the bill of sale gave him the legal property in the after-acquired goods whenever they should come into the possession of Manning on the premises. For the defendant it was argued that the bill of sale only gave the plaintiff an equitable property in the goods. It was ingeniously argued for the plaintiff that the bill of sale was equivalent at law to a contract on the part of Manning that when any goods should come on to his premises for his business they should become the legal property of the plaintiff, and the case was likened to a contract of purchase and sale of unspecific goods, where the property does not pass at the moment of the contract, but when the goods are appropriated. Let us see what the law is. For a long series of years, where a bill of sale has assumed to assign future property to come upon the premises of the grantor, it has been held by the common-law courts that that assignment does not pass the legal property in the goods, even when they have come on to the premises. The courts of equity have always held that, in those circumstances, when the goods have come upon the premises, the interest of the assignee under the bill of sale is not a

legal, but only an equitable, interest. Therefore the case is decided by authority. The interpretation in equity was that the document was considered as equivalent to a contract that, when the goods should be acquired, then there should be an equitable property in them. It was equivalent to a contract. They said that it was to be supposed that the parties intended that there should be some security, and that the court should say that it was an equitable contract that, when the goods should come into possession, there should be an equitable property in them. It seems to me that the language of JESSEL, M. R., in *Collyer* v. *Isaacs*, is exceedingly plain, and that, according to ordinary interpretation, it means what I have stated. He says, "The creditor had a mortgage security on existing chattels, and the benefit of what was, in form, an assignment of non-existing chattels which might be afterwards brought on to the premises. That assignment, in fact, constituted only a contract to give him the after-acquired chattels. A man cannot in equity, any more than at law"—he does not say "make a contract to," but—"assign what has no existence. Any man can contract to assign property which is to come into existence in the future, and, when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment." The contract is the governing thing there, and the clear meaning is that the contract becomes a complete assignment in equity and not in law.

It follows, therefore, that the interest of the plaintiff in these goods, even after they had come into the possession of Manning, was only an equitable interest. The legal interest—*i. e.*, the legal property—was in Manning. Therefore Manning, having the legal property, takes that property which at common law is his, and pledges it for an advance of money. The right of the pledgee in England as to goods which are the legal property of the pledger is not an equitable, but a legal right. It is a legal right, to be enforced by legal remedies. Therefore, the title of the defendant is a legal right—that of the plaintiff is only an equitable interest. In those circumstances the plaintiff could not maintain against the defendant the legal remedy of trover and detinue.

It was suggested that the defendant was not to be considered a *bona fide* purchaser, because, if he had inquired, he would have learned the position of Manning. That is a far-fetched argument,

for which there is no foundation. There was another point made for the defendant. It was said that Manning was an agent for sale within the meaning of the Factors Acts. The answer is that such an agent is one who is selling for a principal; but, according to the circumstances of this case, Manning was to sell for himself, and not for a principal. The plaintiff fails here because the defendant, as against him, has a superior right.

COTTON, L. J.—In this case the action was to recover certain jewelry which had been pledged by one Manning to the defendant. At the time of the pledge Manning had granted to the plaintiff a bill of sale, which comprised, not only the stock-in-trade then belonging to Manning, but also all stock-in-trade which should be afterwards acquired by him. The only question is as regards stock which was not then the property of Manning, but was afterwards acquired by him, and brought to his shop. The first question is whether, by virtue of that bill of sale, the plaintiff acquired any legal property in that after-acquired stock-in-trade. The case of *Holroyd* v. *Marshall*, 10 H. L. Cas. 191, decided (though with considerable doubt among those members of the House of Lords who had been trained in the common-law courts) that in equity, when there was an assignment for value of property not then belonging to the assignor, there was an implied obligation on his part to convey the property when it was sufficiently identified. Then, as equity considers that what a man has bound himself to do must be considered as effectual as if it has been done, there is, therefore, in equity an assignment of the after-acquired property. But it was there laid down in terms that in law such an assignment would be of no effect, the doctrine of the common-law courts being that an assignment of property not in existence is null and void, but that in equity such an assignment, if for value, was a good equitable assignment. That was not only recognised in *Holroyd* v. *Marshall*, but also in *Lunn* v. *Thornton*, 1 C. B. 379, which was very like the present case, as an assignment of future property. The Judicature Act has not swept away such distinctions. It has often to be said that the primary object of the act was to enable all courts to recognise all rights whether legal or equitable, and not to treat legal and equitable rights as the same, but that though at law equitable rights ought to be effectual, yet that effect should be given to legal rights where they were to pre-

vail. By section 25 (11), "Generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." To see the effect of that the previous parts of the section must be looked at. But it is merely necessary here to look at sub-section 10, which says, "In questions relating to the custody and education of infants the rules of equity shall prevail." In my opinion sub-section 11 was not intended to alter the effect in law of an assignment as it previously stood, but simply to say that the courts in administering rights in law and equity should adopt the rules of equity, and not to say that an assignment previously inoperative at common law should be considered to be operative. I re-state this though I have already stated it, perhaps in other words, in *Clements* v. *Matthews*, 11 Q. B. Div. 808. That being so, this deed purporting to assign after-acquired property, in my opinion, gives the assignee only an equitable title in such property. But it is said that there may be a contract that, on certain things being done, the property when selected should become the property of the assignee. But the contract here is a contract which purports to do that which the common law says cannot be done, and the common law, not adopting the principles of equity, says that it shall be void.

That being so, the conclusion is that, as regards the particular chattels in question, the plaintiff has only an equitable title. The legal title remained in Manning subject to his contract with the plaintiff. Equity does not deprive a person of the benefit of a legal title unless there is some equity against it, and he has notice of the existence of a prior equity. The question is whether it can be shown that the defendant had notice of the equitable right of the plaintiff. There is nothing in the evidence to lead to that conclusion. All that could be said was that here was a man pledging his stock-in-trade and that the defendant ought to have inquired whether there was a bill of sale. In my opinion that was not right. If there had been anything to lead a reasonable man to suppose that there was a bill of sale, then, if he had not made the usual search, he would suffer accordingly. To accede to the argument would be to carry the doctrine of constructive notice to an absurd extent. I shall not extend that doctrine, which I think has gone far enough, if not too far. There was nothing here to lead the defendant to

suspect that there was a bill of sale protecting these chattels. The appeal, therefore, must succeed. Possibly a distinction must be drawn between a legal and an equitable title, but HUDDLESTON, B., relied upon the case of *Lazarus* v. *Andrade*, 5 C. P. D. 318, before LOPES, J. That decision was right, because the question there was between an execution creditor and the person entitled to the equitable interest in the property, and an execution creditor does not stand in the same position as the defendant here. But LOPES, J., did refer to the Judicature Acts as giving a legal effect to assignments which are only available in equity. Therefore, so far as HUDDLESTON, B., relied upon an expression of opinion by LOPES, J., our decision shows that that expression is not in accordance with the law.

LINDLEY, L. J.—I am also of the same opinion. The plaintiff must establish either—first, that the legal title was in himself, or, secondly, that he had an equitable title in the goods, and that the defendant had notice of it when he acquired the goods. As to the first point, I confess that I cannot see how it has been made out consistently with the authorities. The clause at the end of the deed shows that the plaintiff knew that he had not got a legal title. The operation of the deed was to transfer the legal property in the existing stock-in-trade, but an equitable title in that to be acquired afterwards. The plaintiff has an equitable title, and he can only deprive the defendant of his title by showing that the defendant had prior notice of the equitable title. The doctrine of constructive notice has not been carried so far as was suggested. It appears to me that our conclusion must be that the appeal must be allowed, and that judgment must be entered for the defendant with costs.

Appeal allowed.

The American law is quite well settled, in accord with *Joseph* v. *Lyons*, that a bill of sale or mortgage, cannot, of itself, and without any new act of appropriation or ratification by either party, operate to transfer the legal title of personal property not then owned by the grantor, and in which he then has no actual or "potential" interest, even though its future acquisition be then contemplated by both parties; *Jones* v. *Richardson*, 10 Met. 481 (a very important case on this point); *Low* v. *Pew*, 108 Mass. 347; *Codman* v. *Freeman*, 3 Cush. 306; *Chesley* v. *Josselyn*, 7 Gray 489; *Head* v. *Goodwin*, 37 Me. 181; *Griffith* v. *Douglass*, 73 Id. 532; *Chapin* v. *Cram*, 40 Id. 561; *Pierce* v. *Emery*, 32 N. H. 505; *Cook* v. *Corthell*, 11 R. I. 482; *Williams* v. *Briggs*, 11 Id. 476; *Otis* v. *Sill*, 8 Barb. 102; *Farmers' Loan Co.* v. *Long Beach Impr. Co.*, 27 Hun 89; *Gardner* v. *McEwen*, 19 N. Y. 123; *Looker* v. *Peckwell*, 38 N. J. Law 253;

Rose v. *Bevan*, 10 Md. 466; *Wilson* v. *Wilson*, 37 Id. 1; *Cheapman* v. *Weimer*, 4 Ohio St. 481; *Comstock* v. *Scales*, 7 Wis. 159; *Hunter* v. *Bosworth*, 43 Id. 583; *Hunt* v. *Bullock*, 23 Ill. 320; *Roy* v. *Goings*, 96 Id. 361; and many other cases.

And this seems to be so even though such bill of sale or mortgage specifically describes the property intended to be subsequently acquired; for the reason is equally valid that a person cannot convey what he does not then own, whether specified or not; and it is quite generally agreed that his efforts to do so by expressly stating in his bill of sale or mortgage that the same shall apply to and include after-acquired property, either in addition to or substitution for that which is owned at the time, is entirely ineffectual in a court of law: *Moody* v. *Wright*, 13 Met. 17; *Barnard* v. *Eaton*, 2 Cush. 294; *Codman* v. *Freeman*, 3 Id. 306; *Griffith* v. *Douglass*, 73 Me. 532; *Hamilton* v. *Rogers*, 8 Md. 301; *Wright* v. *Bircher*, 5 Mo. App. 322; *Parker* v. *Jacobs*, 14 So. C. 112; and some other cases.

And most courts apply this rule not only in favor of subsequent innocent purchasers or mortgagees from the same grantor after he has acquired the additional property, but also to his attaching creditors who have duly taken the same by legal process against the grantor, after the goods have come into his ownership and possession.

In some courts a second mortgagee or purchaser, with actual notice of a prior mortgage or bill of sale purporting to convey the after-acquired property included in such second conveyance, is held to be affected by such notice, and not to take a good title as against the first: *American Cigar Co.* v. *Foster*, 36 Mich. 368; *Robson* v. *Michigan Central Railroad*, 37 Id. 70; *McGee* v. *Fitzer*, 37 Tex. 27; and some others.

But the mere registry of a prior mortgage, as held in the principal case, has been held not to affect a subsequent mortgagee, in good faith with constructive notice of the prior mortgage: *Jones* v. *Richardson*, 10 Met. 493; *Single* v. *Phelps*, 20 Wis. 398; *Mowry* v. *White*, 21 Id. 417; and it is not easy to see why actual knowledge of a prior mortgage, invalid as to third persons, so far as it applies to unowned property, can change a rule of law and make it valid against a subsequent mortgagee or creditor who takes it from the possession of the owner before any act of appropriation of it under the former mortgage.

But this rule against a valid sale or mortgage of property not then owned by the mortgagor or vendor, does not prevail, even at law, in two classes of cases. One is where, after the acquisition of such included future property, some sufficient act of appropriation thereof has taken place between the vendor and vendee, or mortgagor and mortgagee. Before the rights of any third person has attached, in such cases, the first transfer becomes complete and valid. Thus, if a mortgage expressly includes property not then owned but expected to be acquired, and after such acquisition the mortgagor actually delivers the same into the possession of the mortgagee, or if the latter, more especially under a *clause in the mortgage authorizing it*, has seized and actually taken possession of the same, before any subsequent mortgage, sale, attachment, or seizure on execution has been made, the party claiming under this latter title can not object to the original invalidity of the first mortgage, but the first title will become perfect, at least from and after the time of such new appropriation: Bac. Max. Reg. 14; *Congreve* v. *Evetts*, 10 Exch. 298; *Hope* v. *Hayley*, 5 El. & Bl. 830; *Carr* v. *Allatt*, 3 H. & N. 964; *Rowley* v. *Rice*, 11 Met. 333; *Cook* v. *Corthell*, 11 R. I. 482; *Moody* v. *Wright*, 13 Met. 17; *Brown* v. *Webb*, 20 Ohio 389; *Titus* v. *Mabee*, 25 Ill. 257; *Chynoweth* v. *Tenney*, 10 Wis. 397; *Booker* v. *Jones*, 55 Ala.

266; *Chase* v. *Denny*, 130 Mass. 566; and many other cases.

The other class of cases is where one has at the time of his sale or mortgage, a potential, inchoate, or embryo interest in the property mentioned, which subsequently ripens into a complete and perfect interest; and then the title vests in the first grantee as against third persons, even though the property has much changed or developed, and increased in value since the first sale or mortgage thereof. This is familiar law since the days of Chief Justice HOBART: *Grantham* v. *Hawley*, Hob. 132. Therefore, the owner of sheep may sell the next year's growth of wool; or of a herd of cows the next season's milk, or butter; the owner or lessee of land, the future artificial crops, &c.: *Cayce* v. *Stovall*, 50 Miss. 396; *White* v. *Thomas*, 52 Id. 49; *Thrash* v. *Bennett*, 57 Ala. 156; *Stearns* v. *Gafford*, 56 Id. 544; *Jones* v. *Webster*, 48 Id. 109; *Butler* v. *Hill*, 1 Baxter (Tenn.) 375; *Stephens* v. *Tucker*, 55 Ga. 543; s. c. 58, Id. 391; *Cook* v. *Steel*, 42 Tex. 53; *McGee* v. *Fitzer*, 37 Id. 27; *Moore* v. *Byrum*, 10 So. C. 452; and many others.

This last is more obvious where the crop has been in fact planted when the mortgage or sale thereof is made; as in *Cotten* v. *Willoughby*, 83 N. C. 75; but many courts hold this not essential, and declare that if the mortgagor owns or has a lease of the land on which the crop is to be raised, he may by apt terms make a valid mortgage of an unplanted crop therefrom: *Arques* v. *Wasson*, 51 Cal. 620; *Van Hoozer* v. *Cory*, 34 Barb. 12; *Conderman* v. *Smith*, 41 Id. 404; *Watkins* v. *Wyatt*, 9 Baxt. 250. Though in the absence of statute this extension of the law of potential existence is not everywhere approved. See *Tomlinson* v. *Greenfield*, 31 Ark. 557; *Hutchinson* v. *Ford*, 9 Bush 318; *Redd* v. *Burrus*, 58 Geo. 574.

But notwithstanding the substantial uniformity of the decisions as to the general rule involved, in the principal case, and when only the legal title is involved, as between successive purchasers or mortgagees, yet there is a class of cases following *Holroyd* v. *Marshall*, in which in a court of equity the rights of the first mortgagee or grantee will be protected, as against certain parties claiming the same after-acquired property by a succeeding conveyance from the same grantor: *Mitchell* v. *Winslow*, 2 Story 644; *Beale* v. *White*, 94 U. S. 382; *Brett* v. *Carter*, 2 Low. 458; *McCaffrey* v. *Woodin*, 65 N. Y. 459. But even this is not uniformly assented to.

EDMUND H. BENNETT.

Boston, April 1st 1885.

RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

BOYD v. CONKLIN.

A rural landowner has no right to put up such artificial barriers as will flood his neighbor's land with surface water, that would otherwise escape over his own, for the mere purpose of reclaiming the bed of a pond that had always been on his premises, and of getting rid of the inflow.

The maxim "*Sic utere tuo alienum non lædas*" applied.